No. 16-8255

In the Supreme Court of the United States

Robert McCoy,

Petitioner,

v.

State of Louisiana,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Clark M. Neily III
Counsel of Record
Jay R. Schweikert
Meggan DeWitt
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 218-4631
cneily@cato.org

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QUESTION PRESENTED

Whether a State may constitutionally hale a person into its criminal courts and there force an admission of guilt upon him, even when he insists upon his innocence.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending and securing the principle of defendant autonomy, and ensuring that the criminal defense bar functions as a check on government power through zealous representation of individual citizens—not as an arm of the state imposing its own view of the good on unwilling defendants.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Criminal defense is personal business. A criminal defendant may never face a more momentous occasion than his trial, nor one where his decisions have greater personal consequence. This Court has therefore recognized that the Constitution not only mandates procedural rights for the accused, but also secures a defendant's autonomy in the exercise of those rights: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). This principle of autonomy has received the most judicial attention in the context of self-representation, but also finds expression in the defendant's right to choice of counsel, *see United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), and in a defendant's "ultimate authority to make certain fundamental decisions regarding the case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), even when represented by counsel.

In the present case, Robert McCoy sought to exercise his autonomy on one of the most fundamental decisions a defendant can possibly make—whether to admit or deny his own guilt before a jury. On trial for his life, McCoy made an informed, intelligent, and timely decision to maintain his innocence and put the state to its burden. But that decision was not respected. Over McCoy's express objection, the trial court permitted his attorney, Larry English, to tell the jury that McCoy was guilty of murder. With the court's approval, English even purported to relieve the state of its burden to prove McCoy guilty of murder beyond a reasonable doubt. *See* JA649 ("I took that burden off of [the prosecutor]. I took that burden off of you."). Following this

brazen violation of McCoy's autonomy, the jury returned a unanimous verdict for first degree murder, and sentenced McCoy to death.

The Louisiana Supreme Court upheld McCoy's conviction, and effectively treated his insistence on deciding for himself whether to admit or deny guilt as a claim for ineffective assistance of counsel. But that framing elides the fundamental interest at issue in this case. No one disputes that, in a capital case with overwhelming evidence, it may be tactically advantageous to admit guilt, with the hope of avoiding the death penalty at the sentencing phase. Indeed, *Florida v. Nixon*, 543 U.S. 175, 178 (2004) expressly holds that such a strategy is not inherently deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). But the issue here is not whether such a strategy is reasonable; it is whether a mentally competent defendant, fully informed of his situation, may decide for himself whether to maintain his innocence and demand the state prove his guilt beyond a reasonable doubt.

To be sure, if a defendant has decided to be represented by counsel, his attorney may have the power "to make binding decisions of trial strategy in many areas." *Faretta*, 422 U.S. at 820. But admitting guilt over a client's express objection is much more than a mere strategic decision; it strikes at the very purpose of a jury trial—the adjudication of guilt—and eviscerates the defendant's prerogative to decide upon the objectives of representation by counsel. A criminal justice system built upon the presumption of innocence, with ample procedural protections for the accused to put the state to its burden, becomes a process in which an admission of guilt is forced upon a presumptively innocent defendant without his consent.

Protecting defendants against unwanted admissions of guilt is fully consistent with the Court's decision in *Florida v. Nixon*. That case involved the distinct situation where "a defendant, informed by counsel, *neither consents nor objects* to the course counsel describes as the most promising means to avert a sentence of death." 543 U.S. at 178 (emphasis added). In that scenario—where the defendant is consulted, but chooses *not* to exercise his autonomy—counsel may pursue the course he deems wisest without obtaining the client's express consent. *Id.* That ruling clearly leaves open the possibility of a different outcome when a defendant expressly objects to any admission of guilt. Indeed, *Nixon*'s repeated affirmation of counsel's "duty to discuss potential strategies with the defendant," *id.*, necessarily presumes that the defendant's agency is of prime relevance to this subject.

Beyond the defendant's personal interest, failure to respect defendant autonomy damages the criminal justice system as a whole. Affirming the opinion below would endorse the gross spectacle of a divided defense—where, as here, the defendant interrupts and objects to his own lawyer's presentation, and is impeached by his own counsel under cross-examination. Such a presentation to the jury threatens the adversarial system itself, and undermines public confidence in the fair administration of justice. Adopting the government's position would also put defense counsel in impossible ethical dilemmas and encourage more defendants to proceed *pro se*, even if they otherwise would have welcomed the assistance of counsel. The defendant, his lawyer, and the system as a whole will all be best served by a clear decision protecting the defendant's autonomy.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE AUTONOMY OF CRIMINAL DEFENDANTS.

A. Defendants have the right to make fundamental decisions about their defense and decide upon the purpose of representation by counsel.

This Court has usually not resolved criminal cases on the basis of autonomy *per se*, but it is a principle that underlies decisions across a wide range of contexts—most notably, self-representation, choice of counsel, and the defendant's authority to make fundamental decisions in his case, even when represented by counsel. Taken as a whole, this jurisprudence establishes that autonomy is a bedrock principle of the Sixth Amendment, and due process more generally.

1. Defendant autonomy received robust consideration in *Faretta v. California*, 422 U.S. 806 (1975), and in the Court's subsequent self-representation cases. But in holding that a defendant has the right to represent himself, the Court relied on the larger and more fundamental right "to make one's own defense personally," *id.* at 819, of which self-representation is only one component.

The holding in *Faretta* was not just an interpretation of the Assistance of Counsel Clause, nor a mere inference from the general capacity of defendants to waive constitutional rights. *See* 422 U.S. at 819 n.15 ("Our concern is with an independent right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel.").

Instead, self-representation was "necessarily implied by the structure of the [Sixth] Amendment," and an instance of those constitutional rights that "though not literally expressed in the document, are essential to due process of law in a fair adversarial process." *Id.* at 819 & n.15.[2] The Court emphasized that *all* of the procedural rights in the Sixth Amendment, not just the assistance of counsel, are "grant[ed] to the accused personally, *id.* at 819, and that this suite of "defense tools" must be protected as an "aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally," *id.* at 820. The Sixth Amendment's guarantee that "the accused personally" possesses "the right to make his defense," *id.* at 819, is essentially stating the principle of defendant autonomy.

The extensive legal history of the right to self-representation discussed in *Faretta* underscores the historical basis for defendant autonomy more generally. *See id.* at 821-32. Self-representation is, in some sense, the ultimate expression of autonomy, as it necessarily includes the right to conduct the entirety of one's own defense personally. And many of the Colonial Era sources relied upon by the Court explicitly grounded this right in the natural liberty of all free persons. *See id.* at 828 n.37 (Pennsylvania Frame of Government of 1682 provided that "in all courts all persons of all persuasions may freely appear in their own way"); *id.* at 829 n.38 (Georgia Constitution in 1777 secured "that inherent privilege of every freeman, the liberty to

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[2] The Court gave as examples a defendant's right "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, to testify on his own behalf, and to be convicted only if his guilt is proved beyond a reasonable doubt." *Faretta v. California*, 422 U.S. 806, 819 n.15 (citations omitted).

plead his own cause"); *id.* at 830 n.39 (Thomas Paine, in support of the 1776 Pennsylvania Declaration of Rights, argued that people "a natural right to plead [their] own case").

The subsequent self-representation case law reinforces this autonomy-driven understanding of *Faretta*. *McKaskle v. Wiggins* explicitly confirms that "the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." 465 U.S. 168, 178 (1984). *See also Indiana v. Edwards*, 554 U.S. 164, 176 (2008) ("'[d]ignity' and 'autonomy' of individual underlie self-representation right"). In *Rock v. Arkansas*, the Court held that "an accused's right to present his own version of events in his own words" was "[e]ven more fundamental to a *personal defense* than the right of self-representation." 483 U.S. 44, 52 (1987) (emphasis added). In other words, the right to a "personal defense"—the defendant's autonomy—is the fountainhead from which flow specific procedural guarantees. And in *Weaver v. Massachusetts*, the Court explained that the right to self-representation "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." 137 S. Ct. 1899, 1908 (2017).

Even where the Court has identified the limits of the right to self-representation, it has generally done so in a manner that tracks the limits of autonomy itself. *See, e.g., Edwards*, 554 U.S. at 176-77 (dignity and autonomy interests are not served when defendant lacks the mental capacity to conduct his defense in the first place);[3] *McKaskle*, 465 U.S. at 185 (limited participation of standby counsel at trial did not violate right

[3] It could reasonably be argued that an autonomy-driven understanding of self-representation mandates a different outcome

to self-representation when the *pro se* defendant maintained "actual control of the defense").

Even in *Martinez v. Court of Appeal of California*, which held that the right to self-representation did not apply on appeal, 528 U.S. 152, 160 (2000), the Court acknowledged that "the right to self-representation at trial was grounded in part in a respect for individual autonomy," *id.* Although "autonomy," in the abstract, is "also applicable to an appellant seeking to manage his own case," the foundational notion of *defendant* autonomy implicit in the Sixth Amendment is the right to conduct one's own defense "in preparation for trial and at the trial itself." *Id.* Because the Sixth Amendment does not guarantee a right to an appeal at all, the same concerns do not apply in the appellate context. *See id.* at 160-61.

2. Just as a defendant's autonomy guarantees the right to self-representation, it also supports the right to retained counsel of one's *choice. United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The Assistance of Counsel Clause does not discuss "choice of counsel" in so many words, but the "right to select

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than the one reached in *Indiana v. Edwards*, and that mentally ill defendants—when competent to stand trial—should be permitted to elect self-representation. *See* 554 U.S. 164, 187 (2008) ("[I]f the Court is to honor the particular conception of 'dignity' that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.") (Scalia, J., dissenting). But regardless of whether *Edwards* was rightly decided, both the majority and the dissent agreed on autonomy as the foundational principle; they simply disagreed on its application in the area of mental illness. *See generally* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1184-87 (2010) (discussing the complicated relationship between mental illness and defendant autonomy).

counsel of one's choice . . . has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147-48. It is not just a procedural protection for the accused, but rather a reflection of the larger right to a personal defense. This component of the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel *he believes* to be best." *Id.* at 146 (emphasis added).

3. Once a defendant chooses to be represented by counsel, "law and tradition may allocate to the counsel the power to make binding decisions of strategy in many areas." *Faretta*, 422 U.S. at 820. But a defendant retains "ultimate authority to make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)).

The Court has not given precise standards for identifying such "fundamental decisions," but examples include the decision to enter a guilty plea[4] (or the functional equivalent of a guilty plea),[5] waive the right to

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[4] *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

[5] *Brookhart v. Janis*, 384 U.S. 1, 6-7 (1966) (counsel lacked authority to agree to a "prima facie" trial that was equivalent to a guilty plea).

a jury trial,[6] waive the right to be present at trial,[7] testify on one's own behalf,[8] and forego an appeal.[9] Lower courts have also held that defendants have the final say on whether to attend important pretrial proceedings,[10] waive the constitutional right to a speedy trial,[11] and enter an insanity plea.[12] And many courts have addressed the precise issue in this case, and held that counsel may not concede guilt at trial over a defendant's express objection. See cases cited *infra*, p. 20.

In general, these "fundamental decisions" speak to one or both of two major sets of questions in which concerns for defendant autonomy are at their peak. First, a defendant has the authority to decide, as a threshold matter, whether to avail himself of certain structural elements of the criminal justice system—i.e., by entering a plea, waiving a jury trial, or taking an appeal. Second, the defendant has final authority over his *personal* involvement (or non-involvement) in his case,

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[6] *Taylor v. Illinois*, 484 U.S. 400, 417-18 & n.24 (1988) (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277 (1942).

[7] *Taylor*, 484 U.S. at 417-18 & n.24 (citing *Cross v. United States*, 325 F.2d 629, 632-33 (D.C. Cir. 1963)).

[8] *Jones*, 463 U.S. at 751; *see also Rock v. Arkansas*, 483 U.S. 44, 49 (1987) ("[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.").

[9] *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Jones*, 463 U.S. at 751.

[10] *Carter v. Sowders*, 5 F.3d 975, 981-82 (6th Cir. 1993) (deposition); *Don v. Nix*, 886 F.2d 203, 206-207 (8th Cir. 1989) (same); *Garcia v. State*, 492 So.2d 360, 363-64 (Fla. 1986) (pretrial conference).

[11] *Townsend v. Superior Court*, 543 P.2d 619, 624 (Cal. 1975) (distinguishing between the constitutional and statutory right).

[12] *See State v. Bean*, 762 A.2d 1259, 1267 (Vt. 2000) (collecting citations).

and the fundamental goals of his defense—i.e., his attendance at trial and pretrial proceedings, the decision to testify (and what to say), and how to weigh the risks of an adverse verdict or sentence (including whether to take a plea, and whether to admit guilt before the jury). These issues concern not just the *means* by which his objectives will be pursued, but what those objectives actually *are*. *See* Model Rules of Professional Conduct, Rule 1.2 ("A lawyer shall abide by a client's decision concerning the objectives of representation . . . ."); *see also Jones*, 463 U.S. at 753 n.6 (citing this language from the proposed Model Rule 1.2).

B. Defendant autonomy, not ineffective assistance of counsel, is the best framework for understanding a defendant's right to make fundamental decisions in his case.

Disputes over the scope of defendant autonomy generally arise from a conflict between a defendant and his attorney, which means these issues often come before the courts as claims for ineffective assistance of counsel. Thus, Courts sometimes treat the defendant's right to make "fundamental decisions" as a question of what does and does not constitute effective assistance. *See, e.g.*, *Jones*, 463 U.S. at 749-50 (failure of appellate counsel to press the client's desired non-frivolous ground for appeal was not ineffective assistance); *see generally* Wayne R. LaFave, et al., 3 *Criminal Procedure* § 11.6(a) (4th ed. 1992) ("[A] claim of ineffective assistance of counsel . . . is probably the most common avenue for presenting [the] issue [of client control] . . . ."). But conceptually, ineffective assistance jurisprudence is an inapt framework for understanding defendant autonomy.

A claim for ineffective assistance is not complete without prejudice. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). "[T]he requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). In the extreme case where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," then "a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). But prejudice is still a conceptual component of the claim; the defendant is simply relieved of the duty to affirmatively establish it. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004).

By contrast, a violation of a defendant's *autonomy* is complete whenever counsel (or the court) usurps control of an issue within defendant's sole prerogative; whether the defendant's attorney provided effective representation following the violation is irrelevant. It is therefore no surprise that the constitutional rights securing a defendant's autonomy closely track those rights for which any violations are considered *structural* defects, and not reviewed for harmless error. *See McKaskle*, 465 U.S. at 177 n.8 (self-representation is structural); *Gonzalez-Lopez*, 548 U.S. at 150 (choice of counsel is structural); *Waller v. Georgia*, 467 U.S. 39, 49 & n.9 (1984) (right to a public trial is structural); *Brookhart*, 384 U.S. at 7-8 (automatically reversing

where a functional guilty plea was entered without a defendant's consent).[13]

The functional effect of conflating these two frameworks is that courts will ask the wrong questions when considering matters of defendant autonomy. Courts may focus on the *reasonableness* of the attorney's decision, or the fairness of the final outcome, rather than the centrality of the issue to the defendant's personal autonomy. *See, e.g.*, *Haynes v. Cain*, 298 F.3d 375, 385 (5th Cir. 2002) (en banc) ("[T]rial counsel's [admission to a lesser included offense over defendant's objection] was not deficient under *Strickland*'s first prong and Haynes was certainly not prejudiced by the trial counsel's approach under *Strickland*'s second prong. . . . However, in my view, *Strickland* does not provide the appropriate framework for analyzing this case.") (Parker, J., dissenting).

Exactly such a conflation happened here. McCoy argued before the Louisiana Supreme Court that "the trial court erred in ruling that the defendant's retained counsel could decide whether to concede guilt of the charged murders at trial, without the defendant's consent." *State v. McCoy*, 218 So. 3d 535, 564 (La. 2017)—clearly a claim sounding in autonomy. But the court

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[13] This Court has suggested that denial of a defendant's right to testify warrants automatic reversal. *See Luce v. United States*, 469 U.S. 38, 42 (1984) ("[T]he appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying."). But lower courts have sometimes held that denial of the right is not structural error. *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 418-19 (Ky. 2011) (citing cases). Nevertheless, "it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt." *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991) (citing *Luce*).

rejected this position based on reasoning functionally equivalent to an ineffective-assistance standard, noting that "[c]onceding guilt, in the hope of saving a defendant's life at the penalty phase, is a reasonable course of action." *See id.* at 566-67. Maybe so. But transmuting McCoy's claim into one for ineffective assistance sidesteps the thrust of his argument and assumes away his right to decide the issue for himself.[14]

II. OVERRULING A DEFENDANT'S DECISION TO DENY GUILT VIOLATES DEFENDANT AUTONOMY.

1. The purpose of a criminal trial is the just and reliable adjudication of guilt. The defense rights detailed in the Sixth Amendment (and granted personally to the accused), "when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice." *Faretta*, 422 U.S. at 818. And hallowed among the pillars of this temple is the presumption of innocence—"that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

But that pillar is smashed and the temple destroyed if an admission of guilt may be forced upon a

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[14] *Amicus* does not intend to suggest that McCoy lacks a viable claim for ineffective assistance of counsel. Defense counsel's admission of McCoy's guilt, impeachment of his own client, and attempted waiver of the burden of proof may well have constituted ineffective assistance under *United States v. Cronic*, 466 U.S. 648 (1984). *See* Br. of Pet'r, at 43-48. The larger point is simply that defendant autonomy is a crucial constitutional value, regardless of the efficacy of counsel's representation.

defendant over his express objection. The rest of a defendant's constitutional rights are hollow and feeble if he lacks authority to muster them toward their ultimate aim—putting the state to its burden of proving guilt beyond a reasonable doubt (a standard that itself has "constitutional stature," *id.* at 364).

The Court characterized the issue in *Faretta* as "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." 422 U.S. at 807. One could likewise frame the question here as whether a State may constitutionally hale a person into its criminal courts and there force an admission of guilt upon him, even when he insists upon his innocence. Stated as such, the right to maintain one's own innocence is perhaps more fundamental to American justice than any of the other rights encompassed within a defendant's autonomy.

2. The defendant's prerogative to maintain innocence before the jury is not diminished in a capital case, where a guilty verdict carries the risk of death. On the contrary, the heightened consequences make it all the more important to ensure that autonomy is respected. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819-20.

Nor is it of any import that a defendant's decision may cause him harm. "Personal liberties are not rooted in the law of averages. . . . [A]lthough [a defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970) (Brennan, J., concurring)). Defendant

autonomy—like all liberty—entails both a privilege to decide and a responsibility to accept the consequences.

Some capital defendants will certainly choose to permit an admission of guilt to minimize the risk of execution. Others may reasonably hold that life in prison—as an admitted murderer in the eyes of the law, their family, and the public—is not a life worth living, and will risk a death sentence for any hope, however small, of exoneration. "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." *Martinez*, 528 U.S. at 165 (Scalia, J., concurring in the judgment).

In the related context of guilty pleas, this Court recently held that a defendant can show he would not have pleaded guilty if he knew he could be deported, even though he had no realistic defense:

> But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. . . . Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee v. United States, 137 S. Ct. 1958, 1968-69 (2017).

Just as a defendant has the right to decide how to weigh the risks of refusing a plea, he likewise has the right to decide how to weigh the risks of denying guilt in a capital case. The answer may turn on his philosophical and religious beliefs about death, his relationship with friends and family, the value he places on his own integrity, and inner knowledge of his own guilt or innocence. These are not strategic questions as to how to achieve a client's objectives; they are questions about what the client's objectives actually *are*. And while this Court has not precisely defined what set of decisions are within a defendant's control, it has cited with approval the imperative in the Model Rules of Professional Conduct, that "[a] lawyer shall abide by a client's decision concerning the objectives of representation . . . ." Rule 1.2(a). *See Jones*, 463 U.S. at 753 n.6.

3. *Florida v. Nixon*, 543 U.S. 175 (2004) is not to the contrary. *Nixon* held that counsel's failure to obtain his client's express consent to concede guilt at trial did not necessarily render his representation deficient. *Id.* at 178-79. While superficially similar, *Nixon* involved a fundamentally different question than the one presented here. Like English, Nixon's defense counsel thought his client's best chance to avoid execution was to admit guilt at trial, and he consulted with his client about this strategy. *Id.* at 181. But whereas McCoy clearly and forcefully *objected* to English's plan, Nixon "never verbally approved or protested [his attorney's] proposed strategy," and gave counsel "very little, if any, assistance or direction in preparing the case." *Id.* In other words, McCoy's autonomy was abrogated, but Nixon effectively declined to exercise autonomy at all.

The *Nixon* Court made clear that its holding was specifically premised on the defendant's failure to

make any decision on counsel's proposed strategy. *See id.* at 189 ("*Given* Nixon's constant resistance to answering inquiries put to him by counsel and court, Corin was not additionally required to gain express consent before conceding Nixon's guilt.") (emphasis added) (citation omitted).[15] Therefore *Nixon*, unlike this case, *was* properly evaluated under the *Strickland* standard. *See id.* at 178.

Nixon not only fails to resolve this case in the state's favor, but its logic actually supports McCoy. The *Nixon* Court repeatedly and firmly based its holding on the premise that counsel had (and met) an affirmative duty to consult with his client. *See id.* at 181 ("Corin attempted to explain this strategy to Nixon at least three times."); *id.* at 189 ("Corin was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon."). But this insistence only makes sense if one first assumes the defendant's agency can shape the outcome. If counsel can overrule the defendant's informed and final decision, whence the need for such substantive consultation in the first place? At best, the duty to *consult* would be reduced to a duty to *notify*. *But see Strickland*, 466 U.S. at 688 (separately discussing the duties "to *consult* with the defendant on important decisions" and "to keep the defendant *informed* of important developments in the course of the prosecution") (emphases added).

Nor is there any tension in holding that a defendant has final authority to decide whether to admit guilt

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[15] Nixon's defense counsel likewise justified his ultimate decision based on Nixon's non-participation. *See Florida v. Nixon*, 543 U.S. 175, 182 (2004) ("As [counsel] explained: 'There are many times lawyers make decisions because they have to make them because the client does nothing.'").

at trial, but that a defendant's silence (after consultation with counsel) can show tacit consent to such a strategy. Certain decisions, like the entry of a plea, *do* require express consent. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Stated differently, a defendant may not *tacitly* waive his right to a jury trial. This rule is premised on the fact that a guilty plea is "an event of signal significance" that necessarily waives *all* of a defendant's constitutional trial rights and "is 'itself a conviction.'" *Nixon*, 543 U.S. at 187 (quoting *Boykin*, 395 U.S. at 242). *Brookhart v. Janis* further holds that express consent is necessary for decisions that are the "equivalent of a guilty plea." 384 U.S. 1, 7 (1966).

But a defendant's right to make fundamental decisions is not *inherently* defined by any correlative requirement of express waiver. To the contrary, a defendant often may tacitly waive rights over which he, not his lawyer, nevertheless has final say. For example, a defendant has the right to self-representation, but may acquiesce to representation by counsel if he does not expressly and timely insist on the right. *See Faretta*, 422 U.S. at 807, 821; *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997). A defendant has the right to testify in his own defense, but need not expressly consent to its waiver. *See Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987). And a defendant has the right to decide whether to take an appeal, *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), but may waive the right if he fails to insist on it, *see Peguero v. United States*, 526 U.S. 23, 28 (1999). The right to decide whether to admit guilt to a jury thus fits comfortably within the framework of autonomy rights this Court has already recognized.

4. That this Court has yet to address the precise issue here may speak more to the stunning nature of the question than the difficulty of its resolution. It is hardly surprising that the majority of lower courts to squarely face the question have held that counsel may not concede guilt (or even stipulate to an element of a crime) over the client's express objection. *See, e.g.*, *United States v. Williams*, 632 F.3d 129, 133 (4th Cir. 2011); *United States v. Dago*, 441 F.3d 1238 (10th Cir. 2006); *State v. Humphries*, 336 P.3d 1121, 1125 (Wash. 2014); *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010); *State v. Carter*, 14 P.3d 1138, 1148 (Kan. 2000); *Cooke v. State*, 977 A.2d 803, 849 (Del. 2009); *State v. Anaya*, 592 A.2d 1142, 1145 (N.H. 1991); *State v. Harbison*, 337 S.E.2d 504, 507-08 (N.C. 1985).

The major case on which English and the Louisiana Supreme Court relied for the contrary position was *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002) (en banc). *See McCoy*, 218 So. 3d at 565, 571 n.36. In *Haynes*, the Fifth Circuit held that admitting to a lesser included offense over a client's objection did not necessarily amount to ineffective assistance. 298 F.3d at 382. But even there, the defendant did not object in *advance* to the strategy of admitting guilt; rather, it seems he first objected to the admission at trial only *after* his counsel's opening statement. *See id.* at 378.[16]

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[16] *Haynes v. Cain* also differs in that it concerned a collateral claim for ineffective assistance, reviewed under the deferential standards of the Antiterrorism and Effective Death Penalty Act. 298 F.3d 375, 379 (5th Cir. 2002) (en banc). But it still provoked a powerful dissent, arguing that "[t]he Constitution mandates that the decision to concede guilt on a lesser charge must be made by the accused, not his attorney, regardless of how difficult it may be for the attorney to mount a defense on all charges." *Id.* at 389 (Parker, J., dissenting). The Fifth Circuit itself has subsequently

By contrast, McCoy made an informed and timely objection to his attorney's plan to tell the jury he was guilty of murder. McCoy consistently maintained his innocence through every stage of the case. Br. of Pet'r, at 4. As soon as English voiced his intent to admit McCoy's guilt (weeks before trial), McCoy was "completely opposed" to the idea, "told [English] not to make that concession," and tried to end the representation. *Id.* at 8-9. He repeated these protestations at a pre-trial conference—his first opportunity to raise them with the judge—but the court dismissed his concerns.[17] *Id.* at 10. And McCoy again objected to English's admissions during the trial itself, and took the stand in his own defense. *Id.* at 11.

Whatever complications might arise from a situation like the one in *Haynes*, where a defendant fails to object until after the admission, they are not present

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expressed skepticism with the logic of *Haynes*. *See Woodward v. Epps*, 580 F.3d 318, 327 (5th Cir. 2009) ("[T]he trial judge afforded Woodward an opportunity to express disagreement with his counsel's tactics on the record, which he did not. *Had Woodward expressed disagreement with his counsel's strategy* [to admit guilt], this might present a closer question as to whether *Cronic*'s presumption of prejudice applies.") (emphasis added).

[17] The record suggests that McCoy's right to self-representation was impermissibly violated, which alone would warrant automatic reversal. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). The trial court had *already* held a *Faretta* colloquy and found him competent, Br. of Pet'r, at 5, but denied McCoy's later request to represent himself, *id.* at 10—even though McCoy had an excellent reason for the request and raised it with the court as soon as practicable. Nevertheless, McCoy's autonomy was violated by counsel's admission of guilt, regardless of whether he properly invoked his *Faretta* right. A defendant is not required to choose between the assistance of counsel and the presumption of innocence.

here. Nor does this case involve any of the complications that could potentially arise with a mentally ill defendant unable to represent himself under *Indiana v. Edwards*, 554 U.S. 164 (2008). The trial court found McCoy competent to stand trial, and later expressly found that he was competent to represent himself. Br. of Pet'r, at 4-5. Future cases may call upon the Court to delineate with greater precision the exact boundaries of a defendant's prerogative to decide whether to admit guilt before a jury. But McCoy's case turns only on the most basic version of this question—whether counsel may concede guilt over a defendant's express, informed, and prior objection.

III. FAILURE TO PROTECT DEFENDANT AUTONOMY WILL UNDERMINE THE INTEGRITY OF THE ENTIRE JUDICIAL PROCESS.

The defendant's right to personally make his defense is the core concern of the Sixth Amendment and the chief issue relevant to this appeal. But failure to protect defendant autonomy would also have dire consequences for the criminal justice system as a whole.

"Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). At times, this imperative may create apparent tension between the institutional interest of the courts and the full exercise of Sixth Amendment rights. *See, e.g., Indiana*, 554 U.S. at 177 (need for the appearance of fairness informs the limitation on self-representation by men-

tally ill defendants); *Wheat*, 486 U.S. at 160 ("institutional interest in the rendition of just verdicts" limits the authority of defendants to waive conflicts of interest in their representation).[18] In this case, however, the defendant's autonomy and the courts' institutional concerns are squarely aligned.

Permitting defense counsel to admit guilt over a defendant's express objection will predictably result in a divided defense before the jury. If a defendant knows that his lawyer plans to admit guilt without his consent, the only means left for him to maintain his innocence is to take the stand and contradict his own attorney. There are a myriad of reasons why even an innocent defendant would still decide to invoke his Fifth Amendment right against self-incrimination—that "great landmark[] in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (citation omitted). But where counsel is determined to concede guilt over his client's objection, the accused is effectively forced to relinquish this right to make his defense.

By definition, an innocence defense and an admission-of-guilt strategy will contradict each other. If a defendant chooses to testify—which he clearly has the right to decide on his own, *Rock*, 483 U.S. at 49—then the lawyer is placed in an impossible ethical dilemma. On the one hand, if defense counsel intends to accrue the tactical benefits of admission, he will likely need to

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[18] *But see* Note, *Rethinking the Boundaries of the Sixth Amendment Right to Choice of Counsel*, 124 Harv. L. Rev. 1550, 1562-64 (2011) (arguing that choice of counsel requires the right to waive *potential* conflicts, because a defendant knows better than the prosecutor or judge whether a conflict will actually arise).

cross-examine and impeach his own client, whose testimony will necessarily be adverse to the strategy. But on the other hand, cross-examining his client is itself likely to prejudice the defendant in the eyes of the jury, and may even introduce prejudicial evidence that the prosecution was unable to offer.

Exactly such a conflict occurred in McCoy's trial. *See* Br. of Pet'r, at 14-15. McCoy took the stand to assert his innocence, and English used his examination to impeach him, asking several questions about McCoy's alleged suicide attempts after the shootings, and asserting that McCoy was, in fact, the individual in a video introduced by the prosecution (but whom no prosecution witness could identify as McCoy). He likewise referred to inculpatory evidence that the prosecutor had not actually introduced (call records from a phone allegedly in McCoy's possession the night of the killings). Predictably, neither McCoy nor English succeeded in their respective goals: the jury found McCoy guilty *and* sentenced him to death.

One can appreciate that English was likely trying to do his best in a difficult position—especially in light of his belief that the Fifth Circuit's decision in *Haynes* required him to follow what he saw as the most prudent strategy, notwithstanding his client's objection. *See McCoy*, 218 So. 3d at 625 ("I agree that Mr. English was left with few options in presenting a defense which satisfied both ethical standards [to his client and to the court], and that he chose the best option available.") (Crichton, J., concurring). But the Court need not cast aspersions on English's character, diligence, or integ-

rity to see that the way out of this dilemma is to remove the incentive for a divided defense in the first place, by securing the defendant's autonomy.[19]

Our criminal justice system is premised on adversarial proceedings, and effective, zealous defense counsel is therefore "critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. But when the defense is divided, the defendant's own attorney, not the prosecutor, becomes his chief adversary. *See United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995) ("admission by counsel of his client's guilt to the jury" is a "paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice"). Whatever hope the defendant had of vindicating his innocence is likely destroyed by his attorney's admissions, and any strategic benefit from the admission is likely lost by the defendant's refusal to cooperate. When admission of guilt is forced upon an unwilling defendant, it is not just the accused who "can only . . . believe that the law contrives against him," *Faretta*, 422 U.S. at 834; it is the jury, and the public at large.

Finally, permitting counsel to admit guilt over the defendant's express objection will incentivize more defendants to proceed *pro se*, even if they otherwise would happily have accepted the assistance of counsel. If a defendant cannot reliably count on his own attorney to advocate his innocence—and if he wishes to avoid a divided defense—then his only alternative may

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[19] As argued in detail in McCoy's merits brief, it is never contrary to defense counsel's ethical obligations to insist on putting the state to its burden, if the defendant has made an informed and voluntary decision to assert innocence. *See* Br. of Pet'r, at 32-38.

be to dispense with counsel entirely. Indeed, McCoy attempted to do exactly that once the court rejected his request to dismiss English.

The right to self-representation is itself central to defendant autonomy, but even the *Faretta* majority said it was "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." 422 U.S. at 834. And the fair management of criminal trials is typically far more frustrating and difficult for courts when defendants elect to proceed *pro se*. *See Martinez*, 528 U.S. at 164 ("[J]udges closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*].") (Breyer, J., concurring).

Such considerations do not warrant denying self-representation to those defendants firmly committed to that path. But they *do* provide ample justification to avoid restricting defendant autonomy in a manner that makes the right essential for defendants committed to vindicating their innocence. Although McCoy was willing and able to represent himself, defendants are not put to such a choice. The assistance of counsel functions as "an aid to a willing defendant," and counsel must ultimately act as "an assistant" to the defense, not its "master." *Faretta*, 422 U.S. at 820. A defendant has the right both to the effective assistance of counsel, *and* to be the master of his own defense.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should reverse the lower court's judgment.

Respectfully submitted,

Clark M. Neily III
Counsel of Record
Jay R. Schweikert
Meggan DeWitt
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 218-4631
cneily@cato.org

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